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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/055,513	01/23/2002	Anthony Brennan	1442026	9358

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HESLIN ROTHENBERG FARLEY & MESITI PC
5 COLUMBIA CIRCLE
ALBANY, NY 12203

EXAMINER

FETSUGA, ROBERT M

ART UNIT	PAPER NUMBER
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3751

DATE MAILED: 09/15/2003

10

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Applicati n No.

10/055,513

Applicant(s)

BRENNAN ET AL.

Examiner

Robert M. Fetsuga

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 07 August 2003.
- 2a) ☒ This action is FINAL. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-41 is/are pending in the application.
- 4a) Of the above claim(s) 19,20,22,33 and 37-39 is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-18,21,23-32,34-36,40 and 41 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☒ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on _____ is: a) ☐ approved b) ☐ disapproved by the Examiner.
- If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. §§ 119 and 120

- 13) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).
- a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

Attachment(s)

- | | |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) Paper No(s). _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449) Paper No(s) _____ | 6) <input type="checkbox"/> Other: _____ |

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1. During a telephone conversation with Victor A. Cardona on September 10, 2003 a provisional election was made without traverse to prosecute the invention elected and prosecuted by applicant's in the parent application, namely the invention of Species I, claims 1-18, 21, 23-32, 34-36, 40 and 41.

Affirmation of this election must be made by applicant's in replying to this Office action. Claims 19, 20, 22, 33 and 37-39 are withdrawn from further consideration by the examiner, 37 CFR 1.142(b), as being drawn to a non-elected invention.

2. The specification is objected to as failing to provide proper antecedent basis for the claimed subject matter. See 37 CFR 1.75(d)(1) and MPEP § 608.01(o). Correction of the following is required: Proper antecedent basis for the subject matter set forth in claim 18, the "means for providing" set forth in claims 28 and 30, and the "method" language set forth in claims 34 and 40, could not be found in the specification. Applicant is reminded claim terminology in mechanical cases should appear in the descriptive portion of the specification by reference to the drawing(s).

Applicant's argue at pages 10-11 of the response filed August 7, 2003 the specification and drawings "support" the noted language. The examiner does not disagree. However, this objection is not one concerned with "support" or "antecedent

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basis" for claim language under 35 U.S.C. 112 as portrayed by applicant. Rather, it is a fact that the noted claim language is not present in the specification (particularly any "method" steps). Compliance with Rule 1.75(d) merely enables a future reader of a potential patent document to quickly ascertain the meaning of the terms of the claims.

3. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless -

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

4. Claims 1-10, 16-18, 21, 23 and 28-32 are rejected under 35 U.S.C. 102(b) as being anticipated by Martin '260.

The Martin '260 (Martin) reference (Figs. 11-15) discloses a system comprising: a body including a water inlet (at 107), an air inlet (at 105) and means for providing a plurality of jets

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102,103; a water chamber 98,99; and an air chamber 100,101, as claimed.

Applicant's argue at pages 11-15 of the response Martin does not disclose attaching the system through an opening in a wall of a tub. However, the initial statement of intended use (hydrotherapy-tub), and all other functional implications related thereto (configured to be attached to a tub), have been considered but do not appear to impose any patentably distinguishing structure of the claimed system over the system disclosed by Martin. Clearly, the claims only recite the "hydrotherapy-tub" as environment and the Martin system is capable of being used in the intended environment. Indeed, if one chose to mount the Martin system over an opening through a tub wall, the body of the Martin system would "cover" that opening.

5. Claims 1-10, 16-18, 21, 23-32, 34-36, 40 and 41 are rejected under 35 U.S.C. 103(a) as being unpatentable over Martin and Gardenier et al.

The Martin system is used in a hydrotherapy tub 93 (Fig. 8).

Re claims 24, 34 and 40, although the Martin system does not include an opening through a tub wall, as claimed, attention is directed to the Gardenier et al. (Gardenier) reference which

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discloses an analogous system which further includes an opening through a tub wall 11. Therefore, in consideration of Gardenier, it would have been obvious to one of ordinary skill in the art to associate an opening with the Martin tub wall in order to provide a more permanent system. It is noted Martin contemplates a permanent system in the bridging sentence of pages 4 and 5.

Applicant's argue at page 14 of the response it is only through "impermissible hindsight reasoning" that Martin and Gardenier have been combined. The examiner can not agree. While the examiner does agree that the background section at pages 1-2 of the instant specification discusses the desirability of providing a permanent type of installation, the same teaching can be found in the Gardenier reference at column 1, lines 18-45, for example. Since Gardenier explicitly teaches the desirability of providing a permanent type of hydrotherapy system, one skilled in the art would consider such disclosure when implementing the Martin system. Thus, a prima facie case of obviousness has been established based upon a showing of facts. Applicant's argue at pages 14-15 of the response the Martin and Gardenier disclosures can not be combined because the Martin system must be portable. The examiner can not agree. As

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previously noted, Martin also contemplates a non-portable system (pg. 5 ln. 1).

6. Claims 11-15 are rejected under 35 U.S.C. 103(a) as being unpatentable over Martin as applied to claims 1 and 28 above, and further in view of Guiler.

Although the water chamber of the Martin fluid flow system does not include conical structures, as claimed, attention is directed to the Guiler reference which discloses an analogous fluid flow system which further includes a water chamber 13 having a conical structure 18. Therefore, in consideration of Guiler, it would have been obvious to one of ordinary skill in the art to associate conical structures with the Martin fluid flow system in order to increase water flow velocity.

Applicant's have not separately argued this rejection beyond the claim dependency.

7. Claims 11-15 are rejected under 35 U.S.C. 103(a) as being unpatentable over Martin and Gardenier as applied to claims 24, 34 and 40 above, and further in view of Guiler.

To associate conical structures with the Martin fluid flow system would have been obvious to one of ordinary skill in the art in consideration of Guiler analogous to the discussion supra.

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Applicant's have not separately argued this rejection beyond the claim dependency.

8. Applicant's remarks have been fully considered and have been previously addressed.

All claims are drawn to the same invention claimed in the application prior to the entry of the submission under 37 CFR 1.114 and could have been finally rejected on the grounds and art of record in the next Office action if they had been entered in the application prior to entry under 37 CFR 1.114.


Accordingly, **THIS ACTION IS MADE FINAL** even though it is a first action after the filing of a request for continued examination and the submission under 37 CFR 1.114. See MPEP § 706.07(b). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event,

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however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

9. Any inquiry concerning this communication should be directed to Robert M. Fetsuga at telephone number 703/308-1506 who can be most easily reached Monday through Thursday.


Robert M. Fetsuga
Primary Examiner
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